Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 16 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

WALTER F. DODD,
DANIEL D. CARMELL,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

Blank Page

SUBJECT INDEX.

	PAGE
The Issues	1
The Temporary Injunction	3
The Permanent Injunction	5
Scope of the Injunctions	8
Respondents' Argument	10
State Policy and the Fourteenth Amendment	12

TABLE OF CASES.

American Federation of Labor v. Bain, (Oregon, October 22, 1940)	13
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184	14
Carlson v. California, 310 U. S. 106	14
Cinderella v. Sign Writers Local Union, 6 Fed. Supp. 164 (1934)	11
City of Yakima v. Gorman, 200 Wash. 564	13
Denver Local Union v. Perry Truck Lines, 101 Pac. (2d) 436 (Colo. 1940)	11
Ellingsen v. Milk Wagon Drivers Union, 2 Labor Cases, 567 (1940)	2, 8

Fenske Bros. v. Upholsterers International Union, 358 Ill. 239 3
Fornili v. Auto Mechanics Union Local, 200 Wash. 283 (1939) 13
Hague v. Committee for Industrial Organization, 307 U. S. 496 ..... 3, 9, 12
Hotel, Restaurant & Soda Fountain Employees' Local Union v. Miller, 272 Ky. 466 (1938) 14
Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board (Wisconsin, November 8, 1940) 13
Keith Theater v. Vachon, 134 Me. 392 (1936) 14
Lyle v. Meat Cutters & Butchers, 174 Tenn. 222 (1938) 14
McKay v. Retail Automobile Salesmens Local Union, (California, October 14, 1940) 13
Miller's Inc. v. Journeyman Tailor's Union (New Jersey, October 10, 1940) 14
Nann v. Raimist, 255 N. Y. 307 4
Ritholz v. Andert, 303 Ill. App. 61 6
Parkinson v. Building Trades Council, 154 Cal. 581 (1908) 11
Schneider v. State, 308 U. S. 147 ..... 3, 9, 12, 14
Senn v. Tile Layers Protective Union, 301 U. S. 468 ... 14
Thornhill v. Alabama, 310 U. S. 88 14

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

Confusion as to the issues of this case is occasioned by Respondents' effort to magnify the element of force and to minimize the scope of the injunctions here involved.

The Issues.

It therefore becomes necessary to restate the issues:

1. With respect to the temporary injunction, did the absence of an employer-employee relation between the parties, together with the admission (by motion to dismiss) of such alleged acts of violence as were properly set up in the complaint, sustain restraint upon a peaceful exercise of freedom of speech and assembly in a labor dispute?

2. With respect to the permanent injunction, does the absence of an employer-employee relation alone and in

and of itself sustain restraint upon a peaceful exercise of freedom of speech and of assembly in a labor dispute?

The restraining clauses here at issue relate only to peaceful action.

The issue is that as to whether all action by non-employees is in itself unlawful because of an alleged unlawful objective of seeking to influence employees to become members of a union, or to influence employers to employ only union employees. This is the basic question argued by Respondents. (Respondents' Brief, 3, 12, 13, 25, 32, 49, 52, 55.) It is in precise accord with a statement subsequently made by the Supreme Court of Illinois, and quoted at page 15 of Petitioners' original brief, but carefully avoided by Respondents. In the case of *Ellingsen* v. *Milk Wagon Drivers Union*, 2 Labor Cases, 567 (1940), the Supreme Court of Illinois, in explaining its position, stated that, in a case of non-employee activities peaceful acts had the effect of force and were unlawful because of an unlawful objective.

Respondents realize that they can sustain a case only on the basis of physical force and violence. The Supreme Court of Illinois has explicitly stated in the *Ellingsen* case that its opinion, which dealt only with the temporary injunction, was not based on the element of physical force and violence; and, had this statement not been made, the well-pleaded allegations of the complaint, which were admitted by motion to dismiss, were insufficient to sustain an injunction against future peaceful actions. And the element of physical force and violence is entirely absent from the proceedings resulting in a decree of permanent injunction.

It is established law in Illinois that, if an employer-employee relation exists, the peaceful acts here involved cannot be enjoined, irrespective of whether they were associated with prior acts of violence or were entirely

free from such association. *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of Petitioners' original brief, Agreement with this statement will be found in Respondents' Brief (page 55).

Although Respondents argue that the objective is unlawful and that all acts in furtherance thereof are also unlawful, they at the same time seek to narrow the scope of clause (d) of the injunctions, and admit that non-employee activities are lawful "anywhere other than in front of the place of business." (Respondents' Brief, 16.) If such acts are lawful elsewhere, they are lawful in streets and public places. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

The Temporary Injunction.

The decisions of the Appellate and Supreme Courts of Illinois sustaining the temporary injunction in the present case were based upon the ground that the trial court improperly granted a motion to dismiss the complaint. For the purpose of testing the sufficiency of the complaint, the motion to dismiss admitted allegations that were well-pleaded in the complaint. The rules governing this Court and the Supreme Court of Illinois in this matter are discussed at pages 27-32 of Petitioners' original brief.

Respondents now contend that Petitioners cannot assert that any of the statements of the complaint are conclusions of the pleader (Respondents' Brief, 10). This view is based on the theory that the Appellate Court in entering a permanent injunction must of necessity have adopted the allegations of the complaint, or that it would not otherwise have enjoined acts of violence, and that such allegations thus became findings of fact by the court (Respondents' Brief, 8, 15, 65). The restraining clauses of the permanent injunction are the same as those of the

temporary injunction issued before answers to the complaint were filed (R. 14, 38), and it could hardly be true that the trial court found facts before there was an opportunity of the parties to answer. There are no findings of fact in either injunction except the one as to the absence of an employer-employee relation in the permanent injunction; and Respondents, while claiming that their complaint impliedly constitutes a finding of fact in the Appellate Court, appear to allege that it was improper for the Appellate Court to make a finding as to the absence of an employer-employee relation which appeared undenied on the face of both complaint and answers. (Respondents' Brief, 6.)

Moreover, there may be some question as to the correctness of Respondents' theory that a labor injunction never restrains acts other than those of a type already committed, and that such injunctions "never operate prospectively" (Respondents' Brief, 55).

This Court has full authority to determine the weight to be given to allegations in the complaint, and also to determine whether such allegations would support restraints in the temporary injunction upon peaceful acts which could not be enjoined under the law of Illinois had there been an employer-employee relation.

Conclusions of the pleader are too common in applications for injunctions in labor disputes; and Mr. Chief Judge Cardozo properly said in *Nann* v. *Raimist*, 255 N. Y. 307, 318, that:

> "Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker."

The Permanent Injunction.

No issue of violence is involved as to the permanent injunction, but only the issue as to whether peaceful acts in a labor dispute may properly be restrained where there is no proximate relation of employer and employee between the parties. However, if the issue of violence were involved here, it would not justify the restraint sought to be imposed.

So long as the motion to dismiss was undisposed of, properly pleaded allegations in the complaint were admitted, and the previously filed sworn answers of Petitioners (defendants below) were not before the Court for consideration. The motion to dismiss having been disposed of by opinion of the Supreme Court of Illinois, it was proper for the Appellate Court to proceed therefrom on the complaint and answers, unless the parties desired to file other pleadings. It would appear unnecessary to develop further this elementary principle of procedure, in view of the fact that Respondents say that: "At the time of the entry of the decree there was before the Appellate Court all pleadings, including the defendants' answers." (Respondents Brief, 6. This statement also appears on page 4.) In view of this necessary admission by Respondents, no weight can be attached to their frequent statements that, with respect to the permanent injunction, all allegations of the complaint shall be taken as true and that all statements in the sworn answers shall be disregarded. (Respondents' Brief, 8, 9, 51, 65, 67.) Respondents' theory appears to be that the sworn answers were reinstated by the disposal of the motion to dismiss, but that such answers are of no effect and that all allegations of the complaint are still admitted. (Respondents' Brief, 8, 10, 24.) On this theory Respondents' Brief (pages 10-11) presents a resumé of the pleadings which is limited to the complaint.

The Illinois practice is sufficiently indicated in *Ritholz* v. *Andert*, 303 Ill. App. 61, 70 (1940):

> "Plaintiffs suggest, rather than argue, that as defendants failed to introduce any evidence to disprove the verified allegations in the second amended bill as to threats, intimidation, etc., these allegations should be taken as proof that the picketing was not peaceful. It is sufficient answer to the suggestion to say that the said allegations were denied in the verified answers filed by defendants. Plaintiffs made the charges of violence and intimidation and the burden was upon them to prove the charges."

The permanent injunction was entered by the Appellate Court on the basis of a complaint and sworn answers then before it, and it clearly appeared as undisputed from the face of such pleadings that there was no proximate relation of employer and employee between the parties (R. 4, 18-23). In entering its permanent injunction, the Court recited in its decree:

> "(3) That this Court and the Supreme Court of this State have held in this case, that, under the law of this state, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees; and,
>
> "(4) That appellants have therefore maintained their complaint, and the equities of the case are with the appellants." (R. 37.)

Respondents contend that these findings are not to be considered by this Court because (1) under present Illinois practice special findings of fact are not necessary to support a decree; (2) no evidence was presented by Petitioners in support of such finding, and (3) a new issue was introduced into the case by such finding (Respondents' Brief, 6-8, 65).

Illinois practice does make it unnecessary that a decree recite all facts or that a person seeking to support the

decree bear the burden of preserving the record in support of such facts, but this does not mean that the courts of equity are not to make findings of fact, nor does it detract from the weight to be given to such findings of fact.

It hardly seems necessary to comment upon the second objection. No record other than the pleadings needed to be preserved as a basis for the finding, and to require evidence as to a matter alleged by complaint and admitted by answer would be ridiculous. Respondents admit that the pleadings were sufficient for a trial and decree on the merits, but contend apparently that the finding upon which the decree is based must be supported by evidence introduced by defendants (Petitioners here), although the facts found are already alleged in the complaint and are admitted in sworn answers by such defendants. Respondents also say that the burden is on Petitioners (defendants below) to support an attack on the final decree (Respondents' Brief, 6), but they forget that they are attacking the finding of a decree which is in their favor. The Appellate Court had power to enter a decree, without evidence, on findings based upon undisputed facts in the complaint and answers which, under decisions by the Appellate and Supreme Courts of Illinois in the present case entitled Respondents to such decree, and Petitioners had no right to object to the exercise of such power.

The third objection to the finding by the Appellate Court is that it introduces a new issue into the case, and that Petitioners, by their application to the Supreme Court of Illinois for writ of error, admitted that the permanent injunction involved the same issues as did the temporary injunction (Respondents' Brief, 7-8, 65). Petitioners fully admit and repeat that the same issues were involved. The issue is that as to the power of restraint where there is no employer-employee relation; it was so stated in the original opinion of the Appellate Court; this statement

was quoted with approval by the Supreme Court of Illinois (R. 26); it is repeated in the Appellate Court's decree in the present case, quoted above (R. 37); it is fully conceded on pages 3-4 of Respondents' Brief; and it has been made the basis of an explanatory statement in a subsequent opinion of the Supreme Court of Illinois. (*Ellingsen* v. *Milk Wagon Drivers Union*, 2 Labor Cases, 567, quoted in Petitioners' original brief, 15.)

The issue on the permanent injunction was determined on the basis of complaint and sworn answers—that under the temporary injunction, on the basis of a then undisposed of motion which admitted certain allegations.

The finding by the Appellate Court is the basis for the permanent injunction and is a part of the final decree in the present case. Refusal of writ of error by the Supreme Court of Illinois affirms this decree.

The decree of the Appellate Court, which made the injunction permanent, and the refusal of the state Supreme Court to review such decree, are based upon the fact that the pleadings showed the absence of a proximate employer-employee relation, and that such absence without more entitled plaintiffs to a permanent injunction under the law as declared by the Appellate and Supreme Courts. This was the finding stated in the Appellate Court's decree. The plaintiffs being entitled to a decree upon such showing, it was therefore unnecessary to remand the case to the trial court for the trying of issues of alleged violence raised by the complaint and denied by answer.

Scope of the Injunctions.

In their original brief (pp. 7-8) Petitioners indicated the scope of restraint imposed by the identical provisions of the temporary and permanent injunctions in the present case. Respondents construe the restraints more narrowly.

(Respondents' Brief, 15, 16, 54.) This difference particularly involves clause (d) which enjoins

> "Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him." (R. 14, 38.)

This clause is supplemented by clause (h) which enjoins "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden," and its scope is defined in the permanent injunction so as to apply to all defendants "individually and in their official capacity, and all other persons as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Respondents take the position that this clause applies only to acts "in front of the place of business"; "threats of intimidation," and to "restraints on speaking or publishing falsehoods and untruths." (Respondents' Brief, 16, 54.) But under the view taken by the Illinois courts, allegations of unfairness would be false and untrue because of the absence of an employer-employee relationship. (Respondents' Brief, 55.) It is for the Court to determine the scope of restraint imposed by these injunctions.

Attention should, however, again be called to the fact that Respondents, in their effort to restrict the scope of the present injunctions, appear to admit the rights of non-employees "anywhere other than in front of the place of business" (Respondents' Brief, 16); and thus concede that solicitation by such non-employees does not have an altogether unlawful objective. This admission brings the present case within the decisions of this Court in the *Hague* and *Schneider* cases.

The *Hague* and *Schneider* cases clearly establish the principle that this Court will protect the substance as well as the form of the rights of freedom of speech, of the

press, and of assembly. It is not enough to say, as do the Respondents in their brief, page 16, that you may speak freely, but not in those places where speech is most naturally exercised and where it will be of the most value in transmitting the communications; that you may assemble, but not in the usual place for assembly; that you may circulate printed matter, but not at places where people usually pass and congregate. The constitutional guarantees apply to the actual exercise of these rights. In labor cases it is not enough to say that labor may communicate information and opinion to the public, but not by picketing, or if picketing is going to be permitted, then only away from the area of the employer's place of business, as the Respondents now attempt to interpet the Illinois Court's injunction. Picketing is the usual and only practical method available to labor for the exercise of these constitutional rights. The Respondents suggest a strange constitutional doctrine that while freedom of speech and of assembly may be exercised, it is no longer freedom of speech and of assembly if exercised by picketing peacefully and in the area of an employer's place of business.

Respondents' Argument.

Aside from the matters heretofore dealt with in this reply, Respondents' answer is primarily an able presentation of an economic point of view, and to this no reply will be attempted.

The only argument relevant to the case is that based upon the absence of an employer-employee relation (except as to certain admissions with respect to the temporary injunction); and this is the basic point in Respondents' Brief, although it is to a large extent concealed by frequently-repeated erroneous statements regarding rules of judicial practice and the degree of admitted allegations

through motion to dismiss the complaint, under that practice.

For example, the Respondents' argument begins (pages 23-25) with an assumed correctness of all allegations in the complaint and proceeds upon that assumption throughout (pages 32, 43, 51-52, 53, 66) although, as has been pointed out, none of such allegations are applicable to the decree of permanent injunction which is based on a finding of one specific and sufficient fact recited in the decree.

And the basic allegation of untruth in the complaint is a conclusion of the pleader, with respect to the pleadings on which the temporary injunction was based (Petitioners' original brief, 28, 29). In fact, Respondents admit (page 55) that the only element of untruth subject to restraint by injunction is based upon the absence of an employer-employee relation. This is also recognized by the Supreme Court of Illinois which, as indicated by Respondent (page 66), said that the very fact that the employer and his employees joined in the present suit established that allegations of unfairness to organized labor were untrue and malicious. (R. 25.)

The courts have had occasion to pass directly on this issue, and have held that the words "Unfair to Organized Labor" merely indicate that there is a dispute between organized labor and the employer, and contain nothing libelous. *Denver Local Union* v. *Perry Truck Lines*, 101 Pac. (2d) 436 (Colo. 1940); *Parkinson* v. *Building Trades Council*, 154 Cal. 581 (1908); *Cinderella* v. *Sign Writers Local Union*, 6 Fed. Supp. 164, 171 (1934).

Attention should again be called to the fact that Respondents' effort to minimize the scope of the present injunctions in fact recognizes that non-employees have a lawful objective in seeking to unionize non-union shops. If this objective may, as they admit, be lawfully pursued

"anywhere other than in front of the place of business" (Respondents' Brief, 16), the objective itself is not unlawful, and may under the decisions of this Court be lawfully pursued in streets and other public places. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

State Policy and the Fourteenth Amendment.

In Petitioners' original brief (pages 18, 19) reference was made to the effect upon state law of an adherence by this Court to its already expressed view that freedom of speech and of assembly in a labor dispute apply equally to the cases where there is or is not a proximate relation of employer and employees. It will not be necessary to repeat the prior statements of this Court, which are quoted at pages 20-22 of Petitioners' original brief.

The present case involves judicial restraint, and it is unnecessary to repeat what has already been said as to the applicability of the Fourteenth Amendment to judicial action. The validity of no state statute is involved in the present case, and both Petitioners and this Court must accept the interpretation placed upon the Illinois Anti-Injunction Act of 1925, although it may be appropriate to remark that this Act omitted the restrictive language of the Clayton Act. A contrary statement is made by Respondents (Brief, pp. 26-28).

But a decision in this case will involve the validity of statutes in some states and the validity of common law rules now applicable in others. The summary in Petitioners' original brief (pages 18-19) did not seek to make a complete analysis of state law, and the importance of the issue here presented is indicated by the fact that some statements true at the time of filing the original brief are not now accurate. The briefs of both Petitioners (page 19) and Respondents (page 35) refer to an Oregon statute of

939. By opinion of October 22, 1940, in *American Federa-ion of Labor* v. *Bain,* the Supreme Court of Oregon, pro-eeding under the state declaratory judgment act, held the)regon statute invalid. The opinion is largely based on he issue, not relevant here, that the limitation of a labor ispute to a majority of the employees defeated the rights f a minority, but the Oregon Court in broad language de-ied "that a man may be deprived of a fundamental consti-utional right because other men in the past have abused he right * * *." A view contrary to that of the Ore-on Court is expressed by the Supreme Court of Wisconsin n the case of *Hotel & Restaurant Employees' Interna-ional Alliance* v. *Wisconsin Employment Relations Board,* lecided November 8, 1940.

The issue of the present case was more directly involved n *McKay* v. *Retail Automobile Salesmen's Local Union,* lecided by the Supreme Court of California on October 14, 940, together with several other cases upon the same sub-ect. In the *McKay* case the Supreme Court of California aid that "the members of a labor union are privileged to ring such lawful pressure to bear, as is within their con-rol, in order to induce non-union employees to join their nion," and that:

> "Of course the employer and its salesmen argue that the appellants have no right to interfere with relations which are entirely satisfactory to them. This position ignores the broader rights of labor in seeking to advance the interests of the worker by more thorough and complete organization."

There are, of course, other states which, by statute or by udicial decision, adopt the view of the Illinois courts; and *'ornili* v. *Auto Mechanics' Union Local,* 200 Wash. 283 1939), shows that such a view may be adopted even in the ace of a state statute couched in the language of the Nor-is-LaGuardia Act, although a contrary view may be re-ected in *City of Yakima* v. *Gorman,* 200 Wash. 564.

Picketing or solicitation by non-employees is also held improper in *Hotel, Restaurant and Soda Fountain Employees' Local Union* v. *Miller*, 272 Ky. 466 (1938); and it is probable that a different rule is not established by more recent legislation in Kentucky. (Ky. Acts, 1940, Ch. 105, Art. III, Secs. 1, 2.) A similar view is taken in *Keith Theater* v. *Vachon*, 134 Me. 392 (1936). A number of cases in New Jersey take the same position, which is apparently approved by the Court of Errors and Appeals of that state in *Miller's Inc.* v. *Journeyman Tailors' Union*, decided October 10, 1940. *Lyle* v. *Meat Cutters & Butchers*, 174 Tenn. 222 (1938), may perhaps also be grouped with these cases, although it may be distinguished on the ground that no labor dispute was involved because the owner alone operated his business without employees.

But the rights of non-employees to freedom of speech and of assembly have been definitely recognized by numerous other state courts and state legislatures; have been recognized by this Court in the *Tri-City Central Trades Council* and *Senn* cases; and the recognition of such rights is implicit in the *Schneider, Thornhill* and *Carlson* cases.

Petitioners' original brief (last paragraph of page 18) cites recent state decisions sustaining the rights of non-employees; and the decisions there cited analyse the concurring view in other states. The scope of freedom of speech and of assembly by non-employees in a labor dispute now varies from state to state; and in individual states similar chaos exists. This chaos is well illustrated by the two apparently conflicting decisions in the State of Washington, referred to above. There is no uniformity of protection from state to state, and there is none within the same state, although the rights are ones protected by the Constitution of the United States.

The scope of freedom of speech and of assembly guaranteed by the Fourteenth Amendment must be determined

by this Court, and the protection to be accorded by that amendment must be uniform, even though this may adversely affect the standards in some states.

The Respondents quote a statement by Mr. Justice Holmes that the states should be left free to make social experiments, but neither he nor any other member of this Court intended that states should be free to experiment with freedom of speech and of assembly under the Fourteenth Amendment.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.